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11 UNITED STATES DISTRICT COURT  
12 WESTERN DISTRICT OF WASHINGTON  
13 AT TACOMA

14 JAMES ERNEST DICKERSON,

15 Plaintiff,

16 v.

17 DAVID HAROLD BRUNEAU *et al.*,

18 Defendants.

Case No. C06-5475RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR:**  
**April 27, 2007**

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20 This 42 U.S.C. § 1983 action has been referred to the undersigned Magistrate Judge pursuant  
21 to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. The plaintiff is not proceeding *in forma*  
22 *pauperis* and has paid the filing fee (Receipt number 1278).

23 In January of 2007 the court entered an order to show cause why this action should not be  
24 dismissed as frivolous (Dkt. # 13). In that order the court stated:

25 In this action, plaintiff challenges the actions of the prosecuting attorney, the  
26 Judge, a police officer, and his assigned counsel. The actions are related to his 1992  
criminal conviction for attempted murder in the second degree (Dkt. # 6). He is  
currently serving a sentence as a result of that conviction (Dkt. # 6).

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28 REPORT AND RECOMMENDATION- 1

1 Before the court are three motions. In the first motion, plaintiff asks for  
 2 misjoinder or non joinder of a defendant (Dkt. # 7). Plaintiff asks to add his assigned  
 3 counsel as a named defendant in this action (Dkt. # 7). This motion must be  
**DENIED.**

4 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that  
 5 (l) the conduct complained of was committed by a person acting under color of state  
 6 law and that (2) the conduct deprived a person of a right, privilege, or immunity  
 7 secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S.  
 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327  
 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if  
 both of these elements are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th  
 Cir. 1985), cert. denied, 478 U.S. 1020 (1986).

8 A defense attorney, even if they are assigned counsel, does not act under color  
 9 of state law. *See Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981). Moreover,  
 10 if plaintiffs actually suffered due to the ineffectiveness of his attorney's performance  
 11 during state court proceedings, this § 1983 case would similarly be dismissed  
 12 pursuant to Heck v. Humphrey, 512 U.S. 477 (1994), as the issue of ineffectiveness  
 13 of counsel necessarily calls into question the fact or duration of plaintiff's conviction  
 14 and plaintiff has not alleged that the underlying conviction has been overturned,  
 15 expunged, or otherwise invalidated.

16 The second and third motion are requests to amend the complaint (Dkt. # 8  
 17 and 12). Plaintiff has submitted a proposed amended complaint that suffers from the  
 18 same defects as his original complaint (Dkt. # 8 proposed amended complaint). No  
 19 complaint that calls into question the 1992 conviction or sentence that is still being  
 20 served will state a claim under 42 U.S.C. 1983 until plaintiff receives relief through  
 21 Habeas Corpus. Heck v. Humphrey, 512 U.S. 477 (1994). The court is aware that  
 22 plaintiff cannot now file a habeas corpus action because his claim is time barred. *See*  
Dickerson v Porter, 05-CV-5635RJB. This means plaintiff is procedurally barred from  
 23 filing this claim. Guerrero v. Gates, 442 F.3d (9th Cir. 2006).

24 Amendment would be futile. Further, this is not the first time Mr. Dickerson  
 25 has brought the claims that are the subject of this action. Mr. Dickerson tried to bring  
 26 an action against his defense counsel in 1996 and that action was dismissed as  
 27 frivolous with the dismissal counting as a strike under the Prison Litigation Reform  
 28 Act. *See Dickerson v Rogers*, 06-CV-5419 FDB.

(Dkt. # 13).

Plaintiff has responded by filing a "Motion To Show Cause" (Dkt. 14). Plaintiff argues  
 proceeding with the action does not call into question the validity of his criminal conviction.  
 However, plaintiff goes on to argue the 40-year sentence he received is evidence the prosecuting  
 attorney and his assigned counsel had an improper motive in charging him with a crime (Dkt. # 14,  
 page 2).

Plaintiff's attorney in a criminal case does not act under color of state law and simply cannot

1 be a proper defendant in a civil rights action. *See Polk County v. Dodson*, 454 U.S. 312, 317-18  
2 (1981).

3 Further, any ruling in plaintiff's favor calls into question the criminal conviction for which he  
4 is currently serving time. As noted above, Plaintiff is time barred from proceeding in Habeas Corpus.  
5 He is procedurally barred from filing this action. *Guerrero v. Gates*, 442 F.3d (9th Cir. 2006).

6 Plaintiff argues the action should be dismissed without prejudice so he may file the action at a  
7 later date (Dkt. # 14). Because of the time bar and the procedural bar, dismissal without prejudice is  
8 not warranted. This action should be **DISMISSED WITH PREJUDICE**. A proposed order  
9 accompanies this Report and Recommendation.

10 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,  
11 the parties shall have ten (10) days from service of this Report to file written objections. *See also*  
12 Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
13 appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
14 72(b), the clerk is directed to set the matter for consideration on **April 27, 2007** as noted in the  
15 caption.

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DATED this 20 day of March, 2007.

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/S/ J. Kelley Arnold

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J. Kelley Arnold

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United States Magistrate Judge

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REPORT AND RECOMMENDATION- 3